No. 80-1199

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN TOBACCO COMPANY, *et al.*,

Petitioners,

v.

JOHN PATTERSON, *et al.*

AMERICAN BRANDS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an employer and a union may be immune from Title VII liability for establishing and maintaining discriminatory lines of progression which are not justified by business necessity, where

(a) the lines of progression were instituted after the effective date of Title VII,[1] and

(b) the lines of progression are not a component of a "seniority system" within the meaning of §703(h).[2]

1/ Contrary to petitioners' statement (Pet. at i), this case presents no question concerning a seniority system "revised" after the effective date of Title VII. Petitioners have conceded that, for the purposes of the petition, the lines of progression "[came] into existence after Title VII's effective date." Pet. at 5 n.5.

2/ This alternative basis for the decision below was relied upon by the panel majority but was not reached by the Fourth Circuit en banc. See Argument II infra.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Charges of race and sex discrimination were filed against American[3/] and the Tobacco Workers'

3/ "American," as used herein, refers collectively to the American Tobacco Company, a Division of American Brands, Inc., and to American Brands, Inc.

Union[4] in 1969. In the ensuing twelve years, the consolidated employment discrimination cases now before the Court have generated three published opinions of the district court,[5] two panel decisions in the Fourth Circuit,[6] and the recent opinions of the Fourth Circuit en banc.[7] But the plaintiffs and class members -- approximately 500 black and female employees and former employees, many of whom have reached retirement age during this protracted litigation[8] --

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4/ "Tobacco Workers' Union" and "Union," as used herein, refer collectively to the Tobacco Workers' International Union and Local 182, Tobacco Workers' International Union.

5/ 8 FEP Cases 778 (E.D. Va. 1974); 11 FEP Cases 577 (1974); 18 FEP Cases 371 (1977).

6/ 535 F.2d 257 (1976); 586 F.2d 300 (1978).

7/ 634 F.2d 744 (1980), reprinted in Pet. App. 1-50.

8/ The individual named plaintiffs began working at American as early as 1941. 8 FEP Cases at 786. "[T]he static condition of the tobacco industry generally, and American in particular, and the advent of automation, both ... have limited opportunities for upward movement of present employees and for new hiring." Id. at 782. As the Fourth Circuit noted, 535 F.2d at 267,

have yet to obtain any monetary relief. 9/ "[T]his litigation has proceeded at a regrettably slow pace to date[, and t]he ultimate relief to those of the plaintiffs [and class members] entitled to back wages has long been denied." Pet. App. 25 (Winter, J., concurring and dissenting). All procedings to determine

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6/ continued

> [t]he [district] court's description of the lack of employment opportunities is well supported by the evidence. No new employees were hired to fill jobs under [the] jurisdiction of the union from September 12, 1955, through June 12, 1964, in the Richmond branch, and May 12, 1966, in the Virginia branch. Employment in both branches decreased from 1953 to 1973 by approximately 1300 workers.

9/ Monetary relief, including not only back pay but also pension and profit-sharing benefits, is the only effective form of relief for the elderly victims of petitioners' discrimination, and for the families of class members who have died while these cases have been pending before the courts. The district court, recognizing the importance of such relief to the plaintiffs and class members here, specifically provided for payment of wrongfully denied profit-sharing and retirement benefits. 8 FEP Cases at 783; 18 FEP Cases at 376.

and award back pay, pension benefits, and other monetary relief have been stayed pending disposition of the latest petition for certiorari,[10/] by which petitioners have brought these cases before this Court for the second time.[11/]

10/ On January 7, 1977, the district court entered an order on remand referring the cases to a special master for proceedings to identify eligible class members and to calculate the amount of back pay and other benefits to be awarded. 18 FEP Cases at 375. These proceedings have never taken place. American and the Union appealed from the district court's denial of their motion to vacate this order and, following the Fourth Circuit's en banc decision remanding once again to the district court, obtained an order from the Fourth Circuit staying its mandate pending application for a writ of certiorari. See Order in No. 78-1083, filed Dec. 11, 1980, extended Jan. 9, 1981. Pursuant to Rule 41(b), Fed. R. App. P., this stay "shall continue until final disposition [of the petition for certiorari] by the Supreme Court."

11/ See American Tobacco Co. v. Patterson, 429 U.S. 920, denying cert. to 535 F.2d 257 (4th Cir. 1976). There the Court denied American's and the Union's petitions for certiorari which presented, inter alia, the following question: "Where a seniority system has operated to permit all employees to compete equally for promotions for a period well in excess of the statutory period during which a charge must be filed, is it permissible to find a violation of Title VII based

The pertinent findings of the district court, which were affirmed by the court of appeals in a decision which this Court declined to review, establish the following facts. See 8 FEP Cases 778 (E.D. Va. 1974), aff'd in pertinent part, 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976). American operates two plants in Richmond, Virgina: the "Virginia branch" manufactures cigarettes, and the "Richmond branch" manufactures pipe tobacco. The two branches are located only a few blocks apart, are covered by a single collective bargaining agreement, are served by one administrative office,[12/] and hire employees from the same labor market. Each branch is divided into two production departments: the prefabrication department blends and prepares tobacco for further processing, and the fabrica-

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11/ continued

on statistics showing continuing disproportionate numbers of blacks and females in some job classifications and white males in others?" Petition for Certiorari, No. 76-46, at 2-3 (1976).

12/ The plaintiffs also challenged discriminatory employment practices in this office, known as the "Richmond office." The pending petition for certiorari does not seek review with respect to those practices.

tion department manufactures the finished products. Employees in prefabrication generally are paid lower wages than those in fabrication, and employees at the Richmond branch generally are paid lower wages than those at the Virginia branch.

Until 1963, American and the Tobacco Workers' Union maintained an overt policy of job and departmental segregation on the basis of race and sex.[13/] Blacks were generally assigned to lower-paying jobs in the prefabrication departments of both branches, while jobs in fabrication were largely reserved for whites.[14/] Promotions were made on the basis of departmental seniority, and employees could not transfer from one department to another without forfeiting seniority.

13/ "Before 1963 the union and the company overtly segregated employees by race with respect to job assignments, cafeterias, restrooms, lockers, and plant entrances. White employees were represented by Local 182 of the Tobacco Workers' International Union, while black employees were represented by Local 216." 535 F.2d at 263.

14/ The branches were also racially indentifiable. As of 1962, blacks held 41 percent of all factory jobs (93 of 227 jobs) at the lower-paying Richmond branch, but only 14 percent of all factory jobs (201 of 1,476 jobs) at the higher-paying Virginia Branch. 8 FEP Cases at 792.

The segregated locals were merged and overt job and departmental segregation came to an end in 1963, but purposeful discrimination continued. Blacks were denied access to higher-paying jobs at the Virginia branch on the basis of unwritten, subjective selection procedures administered by white supervisors. At the Richmond branch, there were no written job descriptions, and supervisors canvassed employees to fill vacancies. 535 F.2d at 263. As late as 1973, the prefabrication department at the Virginia branch remained more than 80 percent black, while the fabrication department was still 86 percent white; the prefabrication department at the Richmond branch was 92 percent black, while the fabrication department was approximately 62 percent white. Id. at 264.[15/]

In 1968, American and the Union instituted a job posting and bidding procedure, under which the bidder with the most seniority within the branch containing a vacancy was awarded the job. At the

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15/ As of 1973, 58 percent of the employees (90 of 156 employees) at the Richmond branch were black, while only 17 percent of the employees at the Virginia branch (149 of 864 employees) were black. 8 FEP Cases at 792.

same time, however, they established an exception to the posting-and-bidding procedure for nine traditionally segregated job classifications.[16/] When a vacancy occurs in one of these job classifications, only employees who have held a specified lower-level job in one of nine "lines of progression"[17/] are eligible to bid on the vacancy. The requirement of experience in a job within a line of progression operates as a prerequisite for the application of the seniority system; among the limited number of employees who satisfy this prerequisite and are therefore

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16/ The following jobs were exempted at the Virginia branch: adjuster, learner adjuster, examiner-making, examiner-packing, adt dryer operator, textile dryer operator, overhaul adjuster, adjuster-prefabrication, and turbine operator. The jobs of adjuster and learner-adjuster were also exempted at the Richmond branch. 8 FEP Cases at 786. The jobs of adt dryer operator and textile dryer operator are traditionally black jobs; the remaining exempt jobs are traditionally white. See Brief for John Patterson, et al., Nos. 75-1259-1261, Appendix A (4th Cir. 1975).

17/ Each line of progression contains only two or three jobs. See 8 FEP Cases at 786. Two lines of progression -- for adjuster and learner-adjuster -- apply to both branches. Id.

eligible to bid on the vacancy, branch seniority is applied to determine the successful bidder. 8 FEP Cases at 786.

The district court found that, in six of the nine lines of progression, the experience requirement was discriminatory and was not justified by business necessity. 8 FEP Cases at 790. The Fourth Circuit expressly affirmed this finding, 535 F.2d at 264-65,[18/] as well as the district court's findings that "rigid segregation" of job classifications characterized both branches as late as 1973, id. at 264, and that the seniority system perpetuated past intentional segregation and was not justified by business necessity, id. at 265.[19/]

18/ As the Fourth Circuit noted, most of the jobs in these lines of progression were in the fabrication departments. "Since black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority." Id. at 264.

19/ The Fourth Circuit also affirmed the district court's findings of race and sex discrimination in the selection of supervisors. 535 F.2d at 272. This issue, which has not been presented to the Court in the pending petition for certiorari, was subsequently remanded to the district court by the Fourth Circuit en banc.

Petitioners subsequently filed a motion under Rule 60(b), Fed. R. Civ. P., asking the district court to vacate its orders and dismiss the complaints on the basis of this Court's decision in, inter alia, International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).[20/] On appeal from the district court's denial of this motion, a majority of the Fourth Circuit panel held, in pertinent part, that §703(h) of Title VII did not provide American and the Union any protection from liability for the discriminatory effects of their lines of progression because those lines were not part of a "seniority system." 586 F.2d at 303. On rehearing en banc, the majority did not reach this question but affirmed on the ground that, even if the lines of progression were considered part of a seniority system, §703(h) has

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20/ The motion also sought dismissal of the complaints on the basis of the decisions in United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), and Hazelwood School District v. United States, 433 U.S. 299 (1977). The Fourth Circuit en banc affirmed the district court's denial of the motion on the Evans issue and remanded the Hazelwood issue for further consideration. Pet. App. 12-19. Neither of these issues is presented by the pending petition for certiorari.

no application to systems established after the effective date of Title VII. Pet. App. 8-9 and n.3. Petitioners have sought review of the en banc court's decision only with respect to this one issue.[21/]

SUMMARY OF ARGUMENT

In Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the Court conducted an exhaustive analysis of the legislative purpose and history of §703(h) of Title VII. The Fourth Circuit en banc correctly applied this analysis in concluding that the immunity accorded seniority systems by §703(h) does not apply to systems instituted after the effective date of Title VII. The result reached by the Fourth Circuit en banc is also supported by

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21/ In addition to affirming the district court on the Evans issue and remanding for further proceedings in light of Hazelwood, the en banc court also remanded for further findings, in light of Teamsters, regarding the seniority system's application to inter-branch transfers. Pet. App. 11-12. The pending petition for certiorari presents none of these issues for review.

the panel majority's conclusion that the lines of progression at issue here do not constitute a "seniority system" within the meaning of §703(h). This conclusion accords with the Court's recent decision in California Brewers Association v. Bryant, 444 U.S. 598 (1980).

In any event, the Fourth Circuit has remanded these cases to the district court for determination of a series of potentially complex factual and legal issues which are not presented for review in the pending petition for certiorari. The circumstances here do not justify a departure from the Court's normal practice of denying interlocutory review. Indeed, the advanced age of many plaintiffs and class members, and their failure to obtain any monetary relief throughout the long history of this protracted litigation, demonstrate why this practice should be followed. The petition for a writ of certiorari therefore should be denied.

ARGUMENT

Reasons for Denying the Writ

I.

THE FOURTH CIRCUIT EN BANC CORRECTLY APPLIED PRIOR DECISIONS OF THIS COURT IN HOLDING THAT DISCRIMINATORY SENIORITY SYSTEMS ADOPTED AFTER THE EFFECTIVE DATE OF TITLE VII ARE NOT EXEMPT FROM THE ACT.

Petitioners' argument that a substantial federal question arises with respect to the reach of §703(h) runs squarely into this Court's prior decisions in International Brotherhood of Teamsters v. United States, supra, 431 U.S. at 350-55, and Franks v. Bowman Transportation Co., supra, 424 U.S. at 757-62, which plainly found the scope and history of the provision's immunity for seniority systems to be limited to systems in existence at the time Title VII was enacted. Indeed, petitioners reargue issues of statutory construction specifically resolved by this Court in the 1975 Term. Certiorari, therefore, should be denied.

The court below found that the legislative history of §703(h) was "exhaustively analyzed" in Teamsters and Franks. Pet. App. 9-10. The Fourth Circuit then held that this Court's analysis

"conclusively demonstrates that Congress intended the immunity accorded seniority systems by §703(h) to run only to those systems in existence at the time of Title VII's effective date, and of course to routine post-Act applications of such systems." Id. In Franks, the Court concluded that "the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act." 424 U.S. at 761. Mr. Justice Powell, joined by Mr. Justice Rehnquist, agreed with the majority that "the 'thrust' of that section is the validation of seniority plans in existence on the effective date of Title VII." 424 U.S. at 791 (concurring in part and dissenting in part); see id. at 780 (Burger, C.J., agreeing generally with Mr. Justice Powell).[22/] In Teamsters, the Court again concluded that "the congressional judgment was that Title VII should not outlaw the use of

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22/ In Franks, the Court reversed a lower court ruling that §703(h) barred an award of retroactive seniority relief.

existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act." 431 U.S. at 353.[23/]

In both Franks and Teamsters, the Court exhaustively reviewed available indicia of congressional intent, and determined that the purpose of §703(h) was to protect incumbent workers who had vested seniority rights when Title VII went into effect. The Court found that Title VII's effect on seniority systems was prospective and not retrospective:

> The initial bill reported by the House Judiciary Committee as HR 7152 and passed by the full House on February 10, 1964, did not contain §703(h). Neither the House bill nor the majority Judiciary Committee Report even mentioned the problem of seniority. That subject thereafter surfaced during the debate of the bill in the Senate. This debate prompted Senators Clark and Case to respond to criticism that Title VII would destroy existing seniority systems by placing an interpretive memorandum in the Congres-

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23/ Mr. Justice Marshall, joined by Mr. Justice Brennan, would have construed §703(h) as not protecting seniority sytems that perpetuate even pre-Act discrimination. 431 U.S. at 384-85 (concurring in part and dissenting in part).

> sional Record. The memorandum stated: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." 110 Cong. Rec. 7213 (1964). Senator Clark also placed in the Congressional Record a Justice Department statement concerning Title VII which stated: "[I]t has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect." Id., at 7207.

Franks, 424 U.S. at 759-60 (emphasis added) (footnotes omitted).

In Teamsters, the Court again reviewed the debate concerning the effect of H.R. 7152 on "existing seniority rights," as well as the Clark-Case interpretive memorandum and the Justice Department statement that "'Title VII would have no effect on seniority rights existing at the time it takes effect.'" 431 U.S. at 350-51. The Court continued:

> While these statements were made before §703(h) was added to Title VII, they are authoritative indicators of that section's purpose. Section 703(h) was enacted as part of the Mansfield-Dirksen compromise substitute bill that cleared the way for the passage of Title VII. The drafters of the compromise bill stated that one of its principal goals was to resolve the ambiguities in the House-passed version of HR 7152. See, e.g., 110 Cong. Rec. 11935-11937

> (1964) (remarks of Sen. Dirksen); id., at 12707 (remarks of Sen. Humphrey). As the debates indicate, one of those ambiguities concerned Title VII's impact on existing collectively bargained seniority rights. It is apparent that §703(h) was drafted with an eye toward meeting the earlier criticism on this issue with an explicit provision embodying the understanding and assurances of the Act's proponents: namely, that Title VII would not outlaw such differences in treatment among employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act."

Teamsters, 431 U.S. at 352 (emphasis added)(footnotes omitted).

Petitioners concede that "[t]his Court is no stranger to the circumstances preceding the adoption of §703(h)." Pet. at 13. However, petitioners seek to avoid the force of Franks and Teamsters by invoking the "plain meaning" rule and questioning the probative value of the legislative history relied on by this Court. Pet. at 10-15. Neither approach is correct or presents a substantial question requiring review.

"[A]s with the other provisions of §703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not." Franks, 424 U.S. at 758. In §703, Congress "proscribe[d] not only overt discrimina-

tion but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Were it not for §703(h), all seniority systems which have a discriminatory impact and are not justified by business necessity would be prohibited. See Teamsters, 431 U.S. at 349. By its terms, however, seniority systems are not unlawful if "bona fide" and if any differences in treatment are not "the result of an intention to discriminate." Id. at 353. This provision, like the parallel exception to the Age Discrimination in Employment Act of 1967,[24/] plainly protects "the countless bona fide ... plans existing ... when the Act was passed." United Air Lines, Inc. v. McMann, 434 U.S. 192, 199 (1977).

The "literal terms of §703(h)," Teamsters, 431 U.S. at 350, are consistent with the statutory purpose and legislative history explicated by the Court in Franks and Teamsters. It is too late in the day for petitioners to argue that a different

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24/ Section 4(f)(2) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §623(f)(2), provides that it shall not be unlawful "to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this [Act]..."

purported "plain meaning" of the statute should control in the face of countervailing clearly expressed legislative purpose and history.[25/] This is particularly true with respect to labor practices legislation. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).[26/] Indeed, the Court has consistently construed the §703(h) exceptions to Title VII's prohibition of employ-

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25/ "'When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."'" Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976), quoting United States v. American Trucking Ass'ns, 310 U.S. 531, 543-44 (1940). See generally Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299 (1975).

26/ See 313 U.S. 185-86:

> Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize.

ment discrimination to effectuate the broad purposes of the Act and the command of specific legislative history. See Griggs v. Duke Power Co., supra, 401 U.S. at 433-36; Franks, supra; Teamsters, supra.

Petitioners attack the Clark-Case and Justice Department statements specifically cited and relied upon by the Court in Franks and Teamsters. Pet. at 13-15. However, the weight to be given these statements was an issue specifically briefed by the parties and decided by the Court in Franks.[27/] The Court in Teamsters characterized these statements as "authoritative indicators" of the purpose of §703(h). 431 U.S. at 352.[28/]

27/ See, e.g., Brief for Petitioners, No. 74-728, at 25-31 (1975); Brief for Respondent Bowman Transportation Co., No. 74-728, at 7-13 (1975); Brief for Respondent United Steelworkers of America and for the AFL-CIO as Amici Curiae, No. 74-728, at 10-22 (1975); Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae, No. 74-728, at 18 (1975).

23/ The Court observed that:

> Senators Clark and Case were the "bipartisan captains" responsible for Title VII during the Senate debate. Bipartisan captains were

The Fourth Circuit, therefore, correctly applied Teamsters and Franks, and no need arises to reconsider their analysis of §703(h).[29] Congress intended to enact a comprehensive pro-

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28/ continued

> selected for each title of the Civil Rights Act by the leading proponents of the Act in both parties. They were responsible for explaining their title in detail, defending it, and leading discussion on it.

Teamsters, supra, 431 U.S. at 351 n.35 (citations ommited). See Griggs, supra, 401 U.S. at 434.

29/ Contrary to petitioners' suggestion, Pet. at 16-17, the Court has not disavowed its analysis of the purpose and history of §703(h). In Teamsters, in the context of a discussion of how the government had proved a post-Act pattern of discriminatory hiring, assignment, transfer, and promotion polices, the Court stated that the section "does not distinguish between perpetuation of pre- and post- Act discrimination," and that holding the seniority system unlawful for perpetuation of post-Act discrimination "would in no way enlarge the relief to be awarded." 431 U.S. at 348 & n.30. Subsequently, the Court clarified the scope of §703(h). Id. at 350-53. In United Air Lines, Inc. v. Evans, 431 U.S. 553, 560 (1977), the Court characterized as "too narrow" a reading of §703(h) "having no application to attacks based on acts occurring after 1965," but nevertheless concluded that "[t]he statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory." In

spective prohibition of employment discrimination while protecting certain incumbent employees with vested bona fide seniority rights at the time Title VII was enacted. It did not sanction for all time an exception which could be applied to thwart "[t]he primary purpose of Title VII ... 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.'" Teamsters, 431 U.S. at 348, quoting

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29/ continued

any event, the Fourth Circuit en banc affirmed the district court's application of Evans to this case (Pet. App. 12-13), and the pending petition for certiorari does not seek review of this issue. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 81-82 (1977), says no more about seniority systems than that they "are afforded special treatment under Title VII itself" in a case where the seniority system was neither intentionally discriminatory nor discriminatory in operation.

Neither Alexander v. Aero Lodge 735, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978), nor Hameed v. Iron Workers Local 396, 24 FEP Cases 352 (8th Cir. 1980), discusses either the purpose or the history of §703(h). Those cases simply do not address the question presented here.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).[30/]

II.

THE RESULT REACHED BY THE FOURTH CIRCUIT EN BANC IS ALSO SUPPORTED BY THE REASONING OF THE PANEL MAJORITY, WHICH CORRECTLY HELD THAT THE LINES OF PROGRESSION ARE NOT PART OF A "SENIORITY SYSTEM" WITHIN THE MEANING OF §703(h).

When American and the Union instituted a posting and bidding procedure for most jobs in 1968, they established an exception for jobs in nine traditionally segregated "lines of progression." 8 FEP Cases at 786. When a vacancy occurs

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30/ This objective is not "illogical." Pet. at 8. Nor is §703(h) so construed "directly contrary" to United Steelworkers of America v. Weber, 443 U.S. 193, 204 (1979). Pet. at 9-10. By parity of reasoning, the repeal of Title VII would accord the greatest immunity to employers and thus would further encourage voluntary compliance. Congress, however, chose otherwise: it is the prospect of enforcement of Title VII guarantees, as this Court has recognized, which "'provide[s] the spur or catalyst'" for voluntary compliance. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975), quoting United States v. N.L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973) (back pay liability); Weber, 443 U.S. at 204 (voluntary affirmative action programs not prohibited by Title VII).

in a job within such a line, only employees who have held a specified lower-level job within that line are eligible to bid on the vacancy. The requirement of experience within a line of progression operates as a prerequisite for the application of the seniority system: among the limited number of employees who satisfy this prerequisite and are therefore eligible to bid on the vacancy, branch seniority is applied to determine the successful bidder. Id. See pp.8-9 supra.

The district court found that, in six of the nine lines of progression, the experience requirement was not justified by business necessity and perpetuated the job segregation created by petitioners' prior discrimination. 8 FEP Cases at 790. Thus, under Griggs, the court correctly concluded that these requirements violated Title VII. The Fourth Circuit affirmed this finding and conclusion, 535 F.2d at 264-65, and this Court denied certiorari, 429 U.S. 920.

On appeal from the district court's subsequent denial of the motion to vacate its orders, the Fourth Circuit panel majority (Judges Winter and Butzner) held, inter alia, that §703(h) did not provide American and the Union any protection from liability for the discriminatory effects of

the lines of progression because those lines were not part of a "seniority system." 586 F.2d at 303. On rehearing en banc, the majority (Judge Phillips, Chief Judge Haynsworth, and Judge Hall) recognized that there was "considerable support" for this "possible alternative basis for decision,"[31/] but they found it unnecessary to decide the question because of their holding that §703(h) has no application to post-Title VII seniority systems. Pet. App. 8-9 n.3. Judges Winter and Butzner concurred in this part of the en banc majority opinion but also reaffirmed their prior panel opinion. Id. at 21.

It is clear from the Court's recent opinion in California Brewers Association v. Bryant, 444 U.S. 598 (1980), that this alternative basis for the Fourth Circuit's decision is dispositive. In

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31/ Prior to the rehearing en banc, American repeatedly represented to the lower courts that neither job nor line seniority was used for advancement in the lines of progresion. See, e.g., Joint Reply Brief of American, Nos. 75-1259-1263, at 18 (4th Cir. 1975) ("employees move through the lines of progression based on plant-wide seniority, not date of entry into the line of progression"); Joint Petition of American for Rehearing, Nos. 75-1259-1263, at 10 (4th Cir. 1976) ("job seniority is not used" in the lines of progression).

California Brewers this Court held that a "threshold requirement" of 45 weeks of service as a temporary employee for entry into a permanent employee seniority track was a component of a "seniority system" within the meaning of §703(h). The Court stated that,

> The 45 week rule does not depart significantly from commonly accepted concepts of "seniority." The rule is not an educational standard, an aptitude or physical test, or a standard that gives effect to subjectivity. Unlike such criteria, but like any "seniority" rule, the 45-week requirement focuses on length of employment.
>
> Moreover, the rule does not distort the operation of the basic system established by the Agreement, which rewards employment longevity with heightened benefits.

444 U.S. at 609-10.

Here, by contrast, eligibility to bid on jobs within a line of progression has nothing whatsoever to do with an employee's seniority at the company, or at any branch, or in any department, or in any job. "In the area of labor relations, 'seniority' is a term that connotes length of employment." California

Brewers, supra, 444 U.S. at 605. But here there is no requirement that the employee spend a year, a week, or even a day in the specified job: so long as the employee "ha[s] become" an assistant textile dryer operator, he or she is eligible to bid on vacancies in the textile dryer operator classification; so long as the employee is "experienced" as a catcher, he or she is eligible to bid on vacancies in the examiner-maker classification. 8 FEP Cases at 786. Because the experience requirement does not "focus[] ... on length of employment," California Brewers, 444 U.S. at 610, it "depart[s] significantly from commonly accepted concepts of 'seniority.'" Id. at 609.

This requirement also plainly "distort[s] the operation of the basic system..." Id. at 610. Under the basic system in the instant cases, the vast majority of jobs are open for bidding by all employees and are awarded to the senior bidder. The better jobs in the six lines of progression at issue, however, are excluded from this system; to exercise his or her seniority in bidding on one of those jobs, an employee must first satisfy the non-seniority experience requirement which the lower courts found to be an artificial and unnecessary barrier to advancement by black and female employees. As the Fourth Circuit recog-

nized, "[s]ince black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority." 535 F.2d at 264 (emphasis added).

As the Court cautioned in California Brewers, §703(h) must not be interpreted in a manner that

> risks swallowing up Title VII's otherwise broad prohibition of "practices, procedures and tests" that disproportionately affect members of those groups that the Act protects. Significant freedom must be afforded employers and unions to create differing seniority systems. But that freedom must not be allowed to sweep within the ambit of §703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system, simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority. There can be no doubt, for instance, that a threshold requirement for entering a seniority track that took the form of an educational prerequisite would not be part of a "seniority system" within the intendment of §703(h).

444 U.S. at 608-09.

The job experience prerequisite here, like the educational prerequisite posited in California

Brewers, departs significantly from commonly accepted concepts of "seniority." It is an artificial and unnecessary barrier to employment opportunities for blacks and women, and it is not part of any "seniority system" protected by §703(h). Accordingly, the courts below correctly concluded that it violates Title VII.

III.

NO EXCEPTIONAL CIRCUMSTANCES JUSTIFY PIECEMEAL REVIEW OF THE FOURTH CIRCUIT'S INTERLOCUTORY DECISION.

As a rule, this Court will not issue a writ of certiorari to review a non-final appellate decision which, like the Fourth Circuit's en banc decision here, remands a case to the district court for further factual and legal determinations. Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R.R., 389 U.S. 327 (1967) (per curiam). In such cases, lack of finality "of itself alone furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1915).

The Fourth Circuit has remanded the instant cases to the district court for determination of a series of potentially complex factual and legal

issues. See pp. 10-11 & nn.19-21 supra. Is American's branch seniority system "bona fide" and protected by §703(h) of Title VII as interpreted in Teamsters, supra? See Pet. App. 11-12. Are there "special qualifications" for American's supervisory positions, and if so, what are the appropriate statistical bases for establishing a prima facie case with respect to those positions under Hazelwood, supra? See Pet. App. 13-19. Is there rebuttal evidence under Hazelwood tending to show nondiscrimination in post-Title VII supervisory appointments and promotions? See Pet. App. 13-19. These issues, which remain to be decided by the district court, may affect American's entire non-craft, hourly paid work force in over 240 job classifications at both branches, as well as the employees in the Richmond office. See 8 FEP Cases at 791. By contrast, the question presented by the petition for certiorari affects only six lines of progression, each of which contains only two or three job classifications. See Pet. App. 32 n.6 (Widener, J., concurring and dissenting); 8 FEP Cases at 786, 789-90.

The Court generally reviews such interlocutory decisions only where "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause," American Construction Co. v. Jacksonville, T. & K.W. Ry., 148 U.S. 372, 384 (1893); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584-85 (1952), or where there is a straightforward issue of law -- for example, a jurisdictional question -- that is fundamental to the continued litigation of the case. See, e.g., Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 685 n.3 (1949). There are no such exceptional circumstances here. Indeed, the advanced age of many plaintiffs and class members and their failure to obtain any monetary relief throughout the long history of this protracted litigation demonstrate why the usual rule against piecemeal review should be followed here. If certiorari is granted now, all further proceedings in the district court may well be delayed indefinitely pending this Court's

decision of the limited question presented by petitioners.[32/] Then, after several more years of litigation in the lower courts, one or more of the parties can be expected to reappear in this Court with yet another petition for certiorari. In the circumstances of this case, the Court should follow its "normal practice of denying interlocutory review." Estelle v. Gamble, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting).

32/ All proceedings on remand have been stayed pending this Court's disposition of the petition. See p. 4 n.10 supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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